

THE CENTRAL LAW JOURNAL

Hon. JOHN F. DILLON, Editor. }
S. D. THOMPSON, Ass't Editor. }

ST. LOUIS, THURSDAY, AUGUST 6, 1874.

SUBSCRIPTION: { \$8 PER ANNUM, in Advance

FRAUD AS A GROUND OF ANNULING MARRIAGE.—We learn from an exchange that a decision has just been made by one of the judges of the Supreme Court of New York, nullifying a marriage on the ground that the woman had been unchaste before wedlock, the fruits of guilt appearing shortly after. It appears that the husband had been deceived. He had heard reports affecting her character, but she had succeeded in convincing him that they were false. The order of the judge was to the effect that the marriage between the parties was obtained by fraud of the defendant, making the same utterly null and void, dissolving it, giving both freedom from the obligation of marriage with each other. The judge ordered the infant child of the parties to be committed to the defendant, and that the defendant pay the plaintiff \$50 as the costs of the action. This decision is similar to Carris v. Carris, decided by the Court of Appeals of New Jersey (*ante*, pp. 235-6), and other cases therein cited.

PRIVILEGED COMMUNICATIONS.—The Washington Chronicle undertakes in its editorial columns to enlighten the public on "Why Moulton hesitates to speak," by showing that Moulton acted in the character of an attorney between Beecher and Tilton, and hence is prohibited from telling what he thus learned, his knowledge having been acquired from them under the seal of professional confidence. In support of this view the writer in the Chronicle learnedly quotes several legal authorities. The nonsense of it, however, consists in two facts: 1. That Mr. Moulton is a merchant, and not an attorney. 2. That if he had been an attorney, he was not acting as the *legal adviser* of either of the parties, but simply as a common friend. In order to be privileged, the communication must have been made to the *counsel, attorney, or solicitor*, acting, for the time being, in the character of *legal adviser*. 1 Greenl. Ev., §§ 239-241.

If our American dailies would follow the example of their English contemporaries and maintain a good lawyer upon their editorial staff, they would not drift into such egregious blunders when they undertake to discuss legal subjects. If the law editor of the London Times, or Pall Mall Gazette, had sent such an article to the printer, the next "privileged communication" would have come from his chief editor to him—"never more to be officer of mine."

The Salaries of Judges.

By the new constitution of Ohio the salaries of the supreme court judges are fixed at five thousand dollars per annum. In defending the action of the convention in this respect the committee appointed to prepare an address to the people say: "In learning and general ability these judges ought to occupy the first rank. It can hardly be expected, however, that men of this character will sacrifice the remunerative practice of their profession for a position on the supreme bench at a salary which scarcely pays their expenses. They must remain at the capital for nearly the entire year, where the cost of living has largely advanced. Their families must be supported and educated. When they shall have ceased to

serve the state they ought not to be thrown penniless upon the world to begin professional life anew, and depend upon regaining the business they sacrificed to serve it. While in office they are forbidden to engage in any other employment; they ought, therefore to be reasonably rewarded, so that something shall remain to them when age and infirmity shall come upon them. But the whole matter is within the power of the general assembly, which may at its first session, reduce the salary if it see proper." While we are not an advocate of large salaries in a republic, we cannot forbear to express the conviction that the salary thus fixed by the convention is still much too low. To expect that men advanced in years, who have families to educate, shall be able to support the dignity and discharge the duties of that high office at a salary of five thousand dollars a year, and besides lay up something for their old age, is almost comical. For a new state like Kansas or Nebraska, such a salary would be sufficient. But for an old and wealthy state like Ohio, it is, large as it may seem to some, quite inadequate. It is about one thousand dollars less than the salary of a London police magistrate. We have heretofore expressed the opinion that the miserable salaries which most of the American states pay their judges, afford a striking illustration of the ingratitude of republics. There are at the bar of every large city, retired judges—old men who having given their best years and strength to the honorable labors of the judicial office, who are literally turned out to starve by the ingratitude of their countrymen. There are some who are literally objects of charity—who live by the contributions of their brethren of the bar, and whose presence among us is a walking monument of the meanness and parsimony of their fellow citizens. Judges ought to hold office during good behavior, or, at least, until they have attained a certain age. They ought to receive a salary adequate to support them in comfort, considering the high character of their office on the one hand, and the simplicity which becomes republican institutions on the other. And when they are retired from the bench, they ought to be retired on a pension sufficient to keep their declining years from want.

Reorganization of the Judiciary of Ohio.

The new constitution of Ohio, will, if ratified, introduce a number of important changes into the judicial system of that state. The necessity for relief of some kind is apparent, when we are told, as we are by the committee of the convention appointed to draft an address to the people of Ohio, that the accumulation of judicial business had so blockaded the courts that from one to two years was required to reach the hearing of a cause in the common pleas, and from five to seven years in the supreme court. The committee say that the causes of this delay were obvious. The practice of second trials duplicated the labors of the common pleas judges. The time which ought to have been devoted to that court was diminished from one to three months in each year to review their own decisions in the district court, while the few hours allotted to this court in each county rendered its decisions a judicial farce, and caused it to fall into popular contempt. The committee

also say that from a general want of confidence in this court, a large proportion of the causes have found their way to the supreme court, and thus have overwhelmed it also.

To remedy these evils a tribunal, called the circuit court, has been created intermediate between the common pleas and the supreme court. The official term of the circuit judges is eight years. This, it is thought, will give the circuit court stability, and be an inducement to legal learning to accept the office. The court sits twice in each county each year. The circuit courts have jurisdiction over the common pleas and other inferior courts.

The supreme court remains unchanged, except that the official term of the judges is extended to ten years. In electing the judges of this and the circuit court, the "minority representation" system of voting is adopted. That is to say, no elector can vote for more than three of the five judges of the supreme court, nor more than two of the three judges of the circuit court. This system is in vogue in New York, and is said to have worked well there.

"Each of the great political parties," say the committee, "is certain to elect a portion of the judges, and will therefore be responsible for their character, integrity and ability. It is supposed that a better class of nominations will thus be secured, the court divested of any appearance of political bias, and its decisions command a more general and hearty confidence."

Provision is also made for the establishment of a temporary commission to assist the supreme court in clearing its docket.

The New Constitution of Ohio.

We have received through the courtesy of Messrs. R. Clarke & Co. of Cincinnati, a copy of the new constitution of Ohio, agreed upon in convention, May 14, 1874, and which is to be submitted to the people for ratification. Among its provisions we note the following: In suits for less than one hundred dollars the jury need not consist of more than six persons. The writ of *habeas corpus* can be suspended only in such manner as shall be prescribed by law. Suits cannot be brought by publication, unless the court shall be satisfied that the residence and post-office address of the defendant cannot be found, so that he cannot have actual notice. This is a wise and excellent provision. The *per diem* of members of the legislature is abolished, and they are to be compensated by a fixed annual salary. The legislature is to sit annually, instead of biennially, as heretofore. The governor is clothed with a limited veto power.

An exceedingly wise and important provision is introduced as to the manner of voting upon appropriation bills, which we state in the language of an address to the people prepared by a committee of the convention: "Under the existing constitution, the general appropriation bill, like the general appropriation bill in Congress, has been made the vehicle for the grossest peculations in the public funds. Absenteeism often reduces the attendance to a mere quorum. A bare majority of this quorum can incorporate into the general appropriation bill, by amendment or rider, any scheme for depleting the treasury. On the final passage of the bill it must be voted on as an entirety, and unless it receive the vote of a majority of all the members elected to each house, it is lost. Appropriations necessary to carry on the government are thus coupled with, and made to abide the fate of, schemes of mere pecula-

tion and plunder. Members are compelled, against their convictions, to vote for the bill including these obnoxious items, or suffer a stoppage of the wheels of government. To prevent this is the purpose of the new provisions in sections twenty-three and twenty-five. Each item of appropriation must stand on its own merits and be voted on separately, by yeas and nays, on the demand of any member. If it fail to receive the constitutional majority it is to be stricken out. Thus each member is made personally responsible to his constituents for the vote he may cast. He can no longer have the pretence that, unless he vote for the bill, including the obnoxious item, it must fail, and the government suspend for want of funds." The governor also has a limited veto as to any separate item in an appropriation bill.

To prevent official extortion it is provided that the probate judges and common pleas clerks shall hereafter be salaried officers, and that all their fees shall be paid into the county treasury. In electing judges the principle of minority representation is adopted, so that both the great political parties shall be represented on the bench. Sweeping changes are made in the judicial system, but as these require to be noticed more in detail, we shall speak of them elsewhere. On the whole, the changes introduced by this instrument are so obviously wise and needful that there can scarcely be a doubt of its ratification by a decisive majority.

TAXATION OF PROPERTY OF RAILWAYS—POWER OF THE LEGISLATURE TO RELEASE MUNICIPAL TAXES ALREADY LEVIED AND DUE.—We publish in this number an important case on the subjects above indicated, very recently decided by the Supreme Court of Iowa. Subjects of this character have undergone frequent examination by this tribunal, and its judgments thereon are entitled to great respect and consideration. It will be observed that the court held, under the special constitutional provisions referred to (art. 8 § 2), that the legislature had no power to release railway companies from the payment of taxes fully due to a municipality at the time the releasing act was passed.

The valuable note to this case was prepared at our instance by Mr. Rodgers, one of the counsel, and in it he discusses the still open question as to the extent of legislative power over the *property rights* of municipal corporations. We consider the case one of unusual interest and value.

RETROACTIVE SCOPE OF NEW BANKRUPT ACT.—The extent of the retroactive effect of the late amendment to the bankrupt act, recently came before Mr. District Judge Hill of the United States District Court for the Northern District of Mississippi, in the case of Hightowner & Butler, and was argued by some of the ablest lawyers in the state (R. S. Smith, H. W. Walters and L. P. Cooper, for the creditors, and H. A. Barr and Robert Taylor, for the debtors); and on the next day the district judge, in a well-reasoned opinion, reached the following general conclusions, which seem to be correct:

1st. Amendments, to the bankrupt law, approved June 22, 1874, do not apply to involuntary proceedings in which the adjudication had passed prior thereto.

2d. These amendments do apply to all involuntary proceedings commenced after the 1st December, 1873, and in which the question of bankruptcy was pending on the 22d June, 1874.

3d. The remedial provisions of these amendments apply to

Aug

all
the

Se

T

RUL

sin

Junc

defe

2

will

credi

ber

deb

pan

amo

veri

30

tio

cure

unit

whic

pro

4

Jun

of

Ord

Miss

Ju

THI

1.

F

answ

under

ing

the

plead

2.

T

road

earni

track,

rai

by i

its

lim

Bridge

3.

A

city ag

for cer

from c

ground

action

4.

S

rai

roa

ing

the

erty w

agains

5.

C

Forbi

erty o

that o

erty o

indiv

ation

i

all pending, or future proceedings in causes commenced since the 1st December, 1873.

See other cases to same effect, *ante* p. 362.

The learned Judge adopted, at the same time, the following RULES OF PRACTICE in involuntary bankrupt cases commenced since December 1st, 1873, and not adjudicated June 22, 1874.

1st. It is ordered that in all such cases the cause proceed as though the petition was amended to conform to the provisions of the amendment made to the bankrupt law, approved June 22, 1874, unless objection is made by the defendant or defendants.

2d. The objection made by such defendant or defendants, will be by affidavit *filed* in court, stating that the petitioning creditor or creditors do not embrace the one-fourth in number and represent the one-third in amount of the defendant's debts, provable under the bankrupt law and will be accompanied by a schedule of the creditors, their residence, and amount of their debts owing by the defendant or defendants, verified by affidavit.

3d. When such affidavit and schedules are filed, the petitioning creditors will be allowed twenty days in which to procure a sufficient number representing a sufficient amount to unite with them, so as to comply with the law as amended, which will be done by amended petition with preliminary proof of debt.

4th. In all involuntary cases commenced since the 22d of June, 1874, the petitioner must allege the requisite number of creditors and amount as required by the amendments. Ordered to apply to the Northern and Southern District, of Mississippi.

July 22, 1874.

R. A. HILL, Judge.

Constitutional Law—Railway Taxation.

THE CITY OF DAVENPORT V. THE CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY.

Supreme Court of Iowa, June Term, 1874.

1. **Practice—Judgment at Once for Part of Admitted Claim.**—I. When the answer admits a certain part of the amount claimed in the petition to be due, judgment under the Iowa code, may be rendered at once for the amount admitted, on motion, leaving the action to proceed for the residue of the claim. This is warranted by section 3135 of the revision of 1860, providing that "if only part of the claim is controverted by the pleading, judgment may at any time be rendered for the part not controverted."

2. **Taxation of Railway Property within City Limits.**—An act requiring railroad companies to pay annually to the state treasurer a tax of one per cent, on their gross earnings "in lieu of all taxes for any and all purposes on the road-bed, right of way, track, rolling-stock and necessary buildings for operating their road," did not exempt a railroad company having such property situated within an incorporated city, authorized by its charter to levy taxes for city purposes on "all taxable property" situated within its limits, from taxation by such city on said property. Following Dunleith & Dubuque Bridge Co. v. City of Dubuque, 32 Ia. 427.

3. **Adjudication in respect to other Taxes no Estoppel.**—In an action by a city against a railroad corporation to recover city taxes levied on defendant's property for certain years, a decree in a former suit, between the same parties, enjoining the city from collecting taxes levied on the same property for other and previous years, on the ground that said property was not taxable, cannot be pleaded as an estoppel in bar of the action. COLE, J., dissenting.

4. **Same.**—In such action a decree in a former suit brought by a stockholder in the railroad company against the city, without making the railroad company a party, enjoining the collection of the tax for one of the years sued for, on the ground that the property was not taxable, cannot be pleaded as an estoppel in favor of the railroad company against the city.

5. **Constitution of Iowa—Exemption of Railroad Property from Taxation Forbidden.**—Art. 8, sec. 2, of the constitution of Iowa, which recites that "The property of all corporations, for pecuniary profit, shall be subject to taxation the same as that of individuals;" requires the legislature to provide for the taxation of the property of such corporations to the same extent and for the same purpose as the property of individuals; and forbids the exemption of such corporate property from any kind of taxation imposed on the property of individuals. COLE, J., dissenting.

6. **Power of Legislature to Release Taxes Levied by Municipal Corporations.**—Sec. 9 of chap. 26 of the laws of 1872, providing that "every railroad company which shall have paid all taxes on gross earnings provided for by chapter 106 of the acts of the 13th general assembly, shall be released from the payment of all other taxes which may have been levied upon the road-bed, right of way, track, rolling-stock and necessary buildings for operating their road, and no taxes for prior years for state, county, municipal or any purpose for which any other tax can be levied under the laws of the state, up to the first day of January last, shall be collected from any such railroad company on such property," is in conflict with art. 8, sec. 2, of the constitution, and, so far as it purports to release city taxes lawfully levied on the property of a railroad corporation, is inoperative and void. COLE, J., dissenting.

7. **Repealing Provision Construed.**—The 13th section of said act, providing that "all laws and parts of laws inconsistent with the provisions of this act are hereby repealed," does not take away the power to collect taxes lawfully levied on railroad property before the passage of the act. COLE, J., dissenting.

8. **Recovery of Taxes by Suit—Practice.**—In an action by a city to recover taxes due to it, the objection that such taxes are not recoverable by action, does not go to the jurisdiction of the court, but to the sufficiency of the cause of action, and, unless such objection was taken in the court below, it cannot be raised on appeal to the supreme court.

Cross appeals from Scott District Court. Action by the city to recover amount of city taxes for the years 1867, 1871; levied on the depot grounds, track and buildings of the railroad company, and on the north half of the bridge across the Mississippi river, within the city limits. The tax on the bridge for 1870 being admitted by the answer to be due, on motion of plaintiff, judgment was rendered against defendant for the amount thereof, with leave to prosecute the suit for the residue of the claim. From said judgment defendant appealed. Plaintiff demurred to the 1st, 2d, 3d, and 4th pleas in defendant's answer. The demurers to the 1st, 2d and 3d pleas were sustained; from which order defendant appealed. The demurrer to the 4th plea was overruled, from which plaintiff appealed. The character of the pleas sufficiently appears in the opinion.

John N. Rodgers, for plaintiff; Cook, Richmond & Brunning, Thomas E. Withrow and Edmonds & Ransom, for defendant.

MILLER, Ch. J.—This case is one of paramount importance, both in the amount of money involved and the quantity of the legal questions presented. It has been argued by learned counsel, with great and unusual ability, and we have endeavored to give the case that careful and deliberate consideration which its magnitude demands.

I. The district court did not err in rendering judgment on plaintiff's motion for the sum confessed by the answer to be due and unpaid as taxes upon the north half of its bridge. The answer in plain and unqualified language says that the "plaintiff is entitled to the sum of \$3,500;" for taxes on the north half of its railroad bridge, for the year 1870, "for which amount and costs to the date of filing this answer, defendant tenders judgment."

The statute (Rev. § 3135), provides that "if only part of the claim is controverted by the pleading, judgment may any time be rendered for the part not controverted." The petition claims to recover city taxes levied upon the depot grounds and buildings thereon upon its railway track, switches and road-bed within the city limits, and also upon the north half of its railroad bridge across the Mississippi river, also within the city limits, for the years 1867, 1868, 1869, 1870 and 1871. Now the claim for taxes on the north half of the bridge for the years 1870, the defendant does not controvert, but confesses that they are due and payable and offers judgment therefor. The case comes clearly within the section of the statute above quoted. The plaintiff claims taxes on different properties for different years. The defendant does not controvert the claim on one of the pieces of property named for one of the years. This being so, the court did not err in rendering judgment for the sum admitted. The confession in the answer is not to be governed by section 3404 of the revision. The offer to confess judgment there provided for does not contemplate admissions or confessions contained in the pleadings. Under that section the offer must be made in court in presence of the plaintiff, or after notice to him that the offer will be made.

It is collateral to the pleading, for if not accepted it "shall not be deemed an admission of the cause of action in amount to which

the plaintiff is entitled, nor be given in evidence at the trial." The offer likewise must be as broad as the acceptance is required to be, and since the acceptance must be in full of all demands, it follows that the offer must be equally broad. It is quite clear that the answer in this case does not come within the provisions of this section.

II. Did the court err in sustaining the demurrer to the first division of the answer? The substance of this count in the answer is, that having, for each and every year for which plaintiff claims, fully paid to the state of Iowa, the taxes on its gross receipts according to the requirements of the statute, the defendant was not liable to pay the taxes claimed, except those on the north half of the bridge for 1870 and 1871; that the payment of taxes by the defendant on its gross receipts was in lieu of all other taxes, including taxes which might have been levied by the city.

In Dunleith & Dubuque Bridge Company v. The city of Dubuque, 32 Iowa, 427, this court held that payment by a railroad company, of a tax of one per centum on the gross earnings of the road, under chapter 69 of the act of the 12th general assembly, did not relieve the railroad company from the payment of city taxes levied upon its property within the limits of the city. The act was held to be confined in its operation to state and county taxes. Under the doctrine of that case the first count of the answer presented no defense, and the demurrer thereto was properly sustained.

III. In the second count of the answer, the defendant pleads as an estoppel a judgment rendered February, 1867, in the District Court of Scott County, enjoining the city of Davenport from collecting city taxes levied by it upon the same property on which taxes are claimed in this case for the years 1863, 1864 and 1865, in a suit brought by the Mississippi and Missouri Railroad Company against the plaintiff herein, and alleging that the defendant in this suit is now the owner of the said property on which taxes were levied, having purchased the same in 1866, at sheriff's sale, on special execution, issued on a judgment of foreclosure of a mortgage on said property. The demurrer raises the question whether that judgment works an estoppel of the plaintiff to collect the taxes sued for in this action. We are of opinion that it does not. While this action may be conceded to be between parties and privies to the former decree, yet we think it is clear that the subject-matter of the two actions are not the same. The taxes enjoined in the former suit were those for 1863, 1864 and 1865. This action is to recover for subsequent taxes. Each year's taxes constitute a distinct and separate cause of action, and the determination of the matters involved in the injunction suit reached no farther than the taxes of the years then in question. The cases are unlike those where two causes of action (as two promissory notes), forming the subject-matter of successive actions between the same parties, *both growing out of the same transaction*, in which a defence set up in the first suit and held good will conclude the parties in the second. So, a judgment of a competent court upon the validity of coupons attached to a bond is conclusive in another action between the same parties upon other coupons attached to the same bond. Bouchaud v. Dias, 3 Denio, 238; Whitaker v. Johnson Co., 12 Iowa, 595. But the taxes of separate years do not, in any just sense, grow out of the same transaction. They are like distinct claims on two different promissory notes, made upon two distinct and separate, though similar, transactions between the same parties. A judgment on one of such notes, it is quite clear, would not be of any force as an estoppel in an action on the other note between the same parties.

In support of these views see the following cases: Arnold v. Arnold, 17 Pick. 4; Ferrers' Case, 6 Coke, 7; Cleaton v. Chambliss, 6 Rand. (Va.) 86; Clark v. Young, 1 Cranch, 181; Beere v. Fleming,* 13 Irish Ch. 506; Norton v. Huxley, 13 Gray, 285; Riker v. Hooper, 35 Vt. 457; Harding v. Hale, 2 Gray, 399; Marsh v. Pier, 4 Rawle, 273; Packet Co. v. Sickels, 5 Wall. 580, and cases cited; Myers v. Johnson Co., 14 Iowa, 47; Simmons v. Van Pelt, 12 id. 368, and cases cited.

[*I can find no such case. S. D. T.]

Again, this case does not fall within the principle involved where a particular issue of *fact* is tried and determined and judgment rendered upon such determination, which judgment estops both parties from afterwards denying the fact thus found and determined. See Bigelow on Estoppel, page 35.

In addition to what has been above said on this point it may be further remarked that the statute under which the former judgment was rendered was repealed by chapter 196 of the laws of 1868, which took effect April 29th, 1868, and this act was superseded by chapter 106 of the laws of 1870. Thus the taxes of 1868 and subsequent years were levied under statutes passed after the adjudication pleaded as an estoppel, and while the act of 1868 is similar in its main features to the act of 1862, which was in force when the injunction decree was rendered, yet a judgment involving the construction of a statute, and turning upon such construction, cannot be invoked after its repeal, as estoppel as to the law under a subsequent statute, though similar in its provisions, for this would deny to the court the power to determine whether the subsequent statute should receive the same in a different interpretation from that placed upon the repealed statute. It would tie the hands of the court, and prevent a construction of the subsequent statute. This cannot be allowed. The former decision may be an authority in a case arising under the subsequent statute, but it cannot be admitted as an estoppel upon the law-questions involved in the subsequent action.

Mr. Justice COLE does not concur in the holding on this point, but holds that since the prior adjudication was based upon the ground that under the state, as it then stood, the city had no power to levy any tax upon the same property, this want of power was therefore as effectually disposed of as it could be by litigating the taxes of each subsequent year. The tax for 1867 was levied under the same law as those embraced in the prior adjudication; other taxes for 1868 and 1869, under laws identical, in these respects, with it, and as to the latter he holds the adjudication conclusive.

IV. The third division of the answer sets up, by way of estoppel, a decree rendered in the Circuit Court of the United States for Iowa, November 2d, 1869, enjoining the city and its marshal from collecting the city taxes levied on the defendant's same property for the year 1868, in a suit by David Dows, of the state of New York, in which case it is alleged that he was then "a stockholder in the defendant's railroad." The tax involved in that case is one of those sued for in this case, but the parties are not the same in that case as in this. The plaintiff in the former case described himself as a stockholder in the defendant's railroad, it is true. This was necessary for the purpose of showing that he had an interest in the relief prayed, and this was the object of the averment. It does not appear to have been made with a view of prosecuting the suit for the benefit, or on behalf of the defendant, nor is it made to appear in any manner, that the railroad company claimed the benefit of the proceedings or even knew of their pendency. It is clear, therefore, that the defendant was neither party nor privy to that action. Nor would the decree in that case have bound the defendant if it had been adverse to the plaintiff therein. For this reason, also, the decree cannot be made a bar to this action. In order to constitute a bar, the former adjudication should have the effect to equally estop both parties. Myers v. Johnson Co., *supra*.

V. In the fourth count of the answer, the defendant claims to have been released from the payment of the taxes sued for, under and by virtue of chapter 26 of the laws of the 14th general assembly, approved April 6th, 1872.

The ninth section of this act reads as follows: "Every railroad company, which shall have paid all taxes on gross earnings provided for by chapter 106 of the acts of the 13th general assembly, shall be released from the payment of all the taxes which may have been levied upon the road-bed, right of way, track, rolling stock and necessary buildings for operating their road, and no taxes for prior years for state, county, municipal or any other purpose for which any tax can be levied under the laws of the State, up to the

first day of January last, shall be collected from any such railroad company on such property."

The act embracing the above provision was passed after the taxes sued for in this action were levied, and after this action had been commenced.

It is insisted by plaintiff's counsel that this section of the act is unconstitutional, and therefore invalid.

The second section of article 8 of the state constitution is in these words: "*The property of all corporations for pecuniary profit shall be subject to taxation, the same as that of individuals.*"

The first enquiry which presents itself in reference to this clause of the constitution is whether the language used is to be understood as merely conferring upon the general assembly the power to tax this class of property; or whether it is in the nature of a mandate, requiring that such property shall be taxed the same as the property of individuals. Taxation is an attribute of sovereignty. It is one of the powers necessary to the life and existence of the state, and unless restricted in the fundamental law the power of the state is full and ample to subject all species of property within the limits to taxation for all lawful purposes. This power is vested in the general assembly by the people, who are the source of political power, in the following broad and comprehensive language: "The legislative authority of the state shall be vested in a general assembly which shall consist of a senate and house of representatives." See state constitution, section 1 of article 3.

Taxes can be levied only in pursuance of law. The law-making authority of the state is the general assembly. This power is given in general terms and confers the authority upon that body to legislate upon all rightful subjects of legislation, unless prohibited from so doing, expressly or by clear implication. Morrison v. Springer, 15 Iowa, 342-3; Stewart v. Supervisors of Polk Co., 30 Iowa 13. The taxing power being one of the sovereign powers of the state, vested in the general assembly, and not being limited in the constitution as to kinds or classes of property subject to taxation, it follows that the general assembly possesses the power, derived from its general legislative authority, to subject all kinds and classes of property to taxation for all proper purposes, and that the clause first above quoted was not necessary to enable it to pass laws for the taxation of the property of corporations.

The power of taxation reaches all classes of property alike, independently of this provision of the constitution. We therefore conclude that since it must have been intended to give some force and effect to this section as a part of the fundamental law, it must be understood as a command to, and as enjoining it as a duty upon, the general assembly to provide by law for the taxation of the property of corporations for pecuniary profit, the same as that of individuals. In other words, this clause *requires* the legislature to provide for the taxation of this class of property, the same as that of individuals.

In the next place, what are we to understand to be intended by the language "the same as that of individuals?"

We need not determine whether this language requires that corporate property shall be taxed *in the same manner* as that of natural persons.

It seems, however, quite clear that it was intended by this language to require the legislature to impose the burdens of taxation upon the property of corporations for pecuniary profit the same as, or equally with, that of individuals. That the property of this class of corporations shall bear the same burdens of taxation as are placed upon that of individuals; that each shall be taxed for the same objects and in the same degree, so that individuals shall not be required to pay any taxes *on their property* which are not assessed and laid upon the *property of corporations* of the class named, nor in any greater proportion. When the legislature provides for taxing the property of individuals, this clause of the constitution requires it to tax the property of corporations for pecuniary profit to the same extent and for the same purposes. If the property of individuals be taxed for the state, county, school and

municipal purposes, the property of this class of corporations must be subjected to the same taxes and at the same rates. The one cannot be exempt and the other liable.

This state of things existed under the law at the time of the passage of the act of the general assembly under consideration. The property of railroad corporations (which are conceded to be corporations for pecuniary profit), was, like that of individuals, subject to taxation for city purposes. See Dunleith and Dubuque Bridge Co. v. City of Dubuque, 32 Iowa, 427. The laws then in force subjected the property of railroad corporations to taxation for municipal purposes, the same as that of individuals. The act of the general assembly under consideration interposes and declares that those railroad companies which shall have paid all taxes assessed against them for other purposes, shall be *released* from these *city taxes*, which have been levied upon their road-bed, right of way, track, rolling-stock, and necessary buildings for operating their road, which would be otherwise subject to such taxation under the law. It seems very clear that here is a direct and palpable conflict between this act of the legislation and the constitutional provisions requiring the property of these corporations to be taxed for the same purposes and the same extent as that of individuals. The effect of the act if held valid would be to *exempt* the property of railroad corporations, situated in cities and incorporated towns, from municipal taxes, while the property of individuals, similarly situated, would be subject thereto; which is the very result that was intended to be prevented by the framers of the constitution.

It is insisted by the counsel for defendant that the act operates as a release of taxes on railroad *property*, and not on railroad *corporations*, and that it makes no distinction in respect to such property between corporations and individuals. In this we cannot concur with the learned counsel. The act under consideration deals *in terms*, with railroad corporations only. The language is, "every railroad company which shall have paid all taxes on gross earnings, etc., shall be released from the payment of all other taxes which may have been levied on the road-bed, right of way, track, rolling-stock and necessary buildings for operating their road, and no taxes for prior years for State, county, municipal or any other purposes for which any tax can be levied under the laws of the state, etc., shall be collected *from any such railroad company on such property.*" The act releases the *railroad companies* who have paid, etc., from all taxes levied for any purpose on the property named. It is not an exemption or release from taxation of a class of property, irrespective of the ownership, but a release of these corporations from taxes which had been levied alike on their property and that of individuals. The act attempts to remove the burden from the corporations and leave it remaining upon individuals having property within the incorporated cities and towns of the state. The terms, "railroad companies," are used in the act as synonymous with "railroad corporations." These terms are used indiscriminately throughout the legislation of the state, and are so used as meaning the same thing. The terms "railroad companies," are more frequently used in the legislative acts than the terms "railroad corporations." In the use of the former terms in the act under consideration, it is beyond doubt they were used as synonymous with "railroad corporations." Indeed this seems to be conceded by counsel for defendant, but they claim that this objection of class legislation applies to all the legislation of the state in reference to railroads. We are not now considering how far the general assembly may go in making laws on other subjects than taxation which apply specially and peculiarly to railroad corporations, or to what extent "class legislation," as it is called, in respect to these corporations, may be carried. On this subject of taxation the constitution has forbidden any discrimination in favor of the property of this class of corporations.

But if the kind of property mentioned in the act under examination, viz: railroad property, be of a character that it may be owned and controlled by a natural person, still it would, under the laws of

the state, be subject to be taxed for municipal purposes when situated within the limits of an incorporated city or town; for the act purporting to release *railroad companies* from the payment of such taxes cannot be construed to release a private individual from the payment of such taxes on the same kind of property when owned by him. This results in discriminating in favor of corporations and against individuals, and is plainly violative of the constitution. Again, if railroad property be of such nature as that it may not be owned or held by an individual, but can only be owned and held by railroad corporations, the act is equally vulnerable to the constitutional objection, for it affects the property only when held by corporations. It exempts the property of railroad corporations from taxation, while that of individuals remains, under the laws of the state, subject thereto. To prevent this state of things was the purpose of the constitutional provision herein set out.

Finding, therefore, that there is this direct and palpable conflict between the enactment under consideration and the constitution, it becomes our plain duty to declare the former invalid and of no effect. *Stewart v. Board of Supervisors, etc., supra.*

It is urged that the 13th section of the act of 1872, which provides that "all laws and parts of laws, inconsistent with the provisions of this act, are hereby repealed," takes away the power and right to collect the city taxes due and unpaid prior to the taking effect of that act. We think there are two satisfactory answers to this claim. *First*, the only laws declared repealed are those inconsistent with the provisions of that act. The only provision in that act, conflicting with the prior statutes upon this question, is the 9th section, which we have just seen is in conflict with the constitution and void. Being void, it is to be treated as if stricken out of the act, which leaves nothing therein inconsistent with the former statutes upon this subject, and hence they are not repealed.

Second, if the effect of the repealing section would be to release the railroad company from taxation upon their property for city purposes, while that of natural persons similarly situated is subjected thereto, then such repeal is in violation of the constitution, for the reason that it creates this inequality, and is invalid and inoperative.

Mr. Justice COLE dissents from the holding in the foregoing division of this opinion, on the grounds and for the reasons stated by him in his dissenting opinion in the case of the City of Dubuque v. the Ill. Cent. Railroad Co. (decided concurrently with this case).

VI. In the view we have taken of this constitutional question, it becomes unnecessary for us to examine and determine the question (very ably argued) whether the plaintiff, a municipal corporation, had such a vested right in the taxes due and delinquent upon the property of the defendant, situated within the city limits, at the time of the passage of the act releasing the same, as that the legislature could not constitutionally interpose and release them.

VII. Counsel on both sides have also very exhaustively argued the question of the right of the plaintiff to sue and maintain an ordinary action at law for taxes due and unpaid. This question is not raised in any manner by the demurrer, and is argued for the first time in this court. It is not a jurisdictional question that may be taken advantage of at any time. If there is anything in the objection, it is that delinquent taxes are not the subject of a civil action, or in other words, that the facts that taxes have been regularly levied on the defendant's property, which remain due and delinquent, do not constitute a cause of action. This objection must be raised by demurrer or otherwise in the court below, and cannot be presented for the first time in this court. We therefore refrain from intimating any opinion on this question.

On the defendant's appeal the judgment of the district court will be affirmed. But as the court erred in overruling the demurrer to the fourth count of defendant's answer, the judgment will, on plaintiff's appeal be

REVERSED.

NOTE.—In the city of Dubuque v. Ill. Cent. R. R. Co., decided in the same court and at the same time with the foregoing case, BECK, J., delivered an elaborate opinion, holding the releasing act of 1872 (in question in the foregoing case), to be unconstitutional, not only because it conflicted with art. 8

sec. 2, of the state constitution, in respect to taxation of the property of corporations for pecuniary profit, but also as being an invasion of the vested rights of property of the cities in the delinquent taxes sought to be released. The opinion maintains that, although the powers of a municipal corporation are subjects, as to their future exercise to be modified or taken away by the legislature, its property rights, acquired by the actual exercise of these powers, (including that of taxation), are as fully protected from legislative deprivation as the property rights of individuals; that the levy of a tax, under authority of law, creates a legal obligation upon the tax payer to pay, which is in the nature of a debt, and which the law implies a promise on his part to discharge. That the rights of the municipality to the taxes thus levied and due are protected against legislative deprivation by the constitutional prohibitions of laws impairing the obligation of contracts, and of the deprivation of property without due process of law. In support of these views the learned judge cites *Milwaukee v. Milwaukee*, 12 Wis. 93; *State v. Haben*, 22 Wis. 660; *Trustees v. Mayor of Aberdeen*, 13 Sm. & Mar. 645; *Bowdoinham v. Richmond*, 6 Greenl. 112; *Benson v. The Mayor*, 10 Barb. 223; *Dillon Munic. Corp.* § 39, and authorities cited. The cases mentioned in the note to the *Dollar Savings Bk. v. U. S. (ante, p. 263)* maintaining the right to sue for a tax, are also cited in support of the position that there is an implied contract to pay the tax.

MILLER, C. J., and DAY, J., concurred in holding the act of 1872, to be in conflict with Sec. 2 of Art. 8 of the Iowa constitution, but declined to give any opinion on the question whether it interfered with vested rights.

COLE, J., dissented, holding that a municipal corporation can have no vested rights as against the state in uncollected taxes, and that Art. 8, Sec. 2, of the constitution, providing that "the property of all corporations for pecuniary profits shall be subject to taxation the same as that of individuals," is not mandatory, but simply authorizes the legislature to provide for such taxation. The learned judge says on this point, "the manifest purpose and intent of the section is, to place the property of corporations, just like the property of individuals, completely within the legislative power for the purpose of taxation; so that the legislature could use the same authority and discretion in the enactment of laws for the taxation of the property of corporations as it could use in the enactment of laws for the taxation of the property of individuals. And the history of this section in the constitutional convention shows that the object of it was to place the property of corporations, then existing within the power of the legislature to tax, although in the flood of special legislation which had preceded the convention, and the peculiar incorporation privileges thereby conferred, many corporations had been granted exemption from taxation. The words "now existing or hereafter created," which were at one time incorporated in the section, were afterwards fully and sufficiently embraced in the phrase "all corporations" used in the section as adopted. The sole practical effect of the section is to clothe the legislature with the authority to subject to taxation the property of corporations, although by the terms of their charters previously granted they were exempted from taxation."

It may be doubted, however, whether the effect here attributed to the constitutional provision is a very "practical" one, for the following reasons:

1st. The chartering of private corporations by special act either with or without exemption from taxation, has never been possible in the state of Iowa; being expressly forbidden by Art. 8, Sec. 2, of the original constitution, as it is by Art. 8, Sec. 1, of the present constitution. All such corporations in the state had been organized under general laws, and were as fully under legislative control as to taxation, as natural persons. The supposed evil, therefore, which the learned judge regards it as the office of Art. 8, Sec. 2, of the present constitution to remedy, did not and could not exist.

2d. If it had existed, the supposed remedy would have been ineffectual, for any corporation enjoying a chartered exemption from taxation, free from legislative interference under the old constitution, would have continued to possess the same immunity under the new one, notwithstanding the section now in question. An exemption from taxation is irrepealable only when it constitutes a contract between the state and the tax-payer; and in that case the state cannot become entitled to violate the contract by a change in its constitution. This is the settled doctrine of the United States Supreme Court. *Dodge v. Wolsey*, 18 How. 331 (360); *Mechs. and Trader's Bank v. Thomas*, id. 384; see *Jefferson Branch Bk. v. Skelly*, 1 Black, 436; see also matter of *Lee & Co.'s Bank*, 19 N. Y. 9 (15).

Hence the construction placed upon the constitutional provision in the dissenting opinion appears to render it nugatory, whether such special exemption of corporations from taxation did or did not exist at the time of its adoption.

In *U. S. Express Co. v. Ellyson*, 28 Iowa, 370, involving the validity of a statute for taxing express and telegraph companies, the same view appears to have been taken of this section of the constitution as is adopted by the court in the principal case, *supra*; although the point was not then expressly determined. COLE, J., delivering the opinion of the court, says (p. 374): "But if

the act did prescribe a rule for the taxation of the property of corporations different from that prescribed for the taxation for the same class of property when owned by individuals, we see no escape from the conclusion that it would be in conflict with the clause of the constitution relied upon and quoted above" (viz., Art. 8, Sec. 2), "and hence inoperative and void."

It may be added that the debates of the constitutional convention throw no light whatever upon the actual intent of the framers of this section, it having passed through all the various stages of consideration and action down to final adoption, *sub silentio*.

On the general question of the extent of the legislative power over the *property* rights of the municipal corporations, (which is one of no little doubt and difficulty), in addition to the authorities cited by Mr. Justice BECK, *supra*, the following cases may be consulted with advantage: State v. St. Louis Co. Court, 34 Mo., 570; People v. Powers, 25 Ill., 190; Richland Co. v. Lawrence Co., 12 Ill., 7; Guilford v. Board of Supervisors, 13 N. Y., 143; Darlington v. Mayor, etc., 31 N. Y., 165; Layton v. New Orleans, 12 La. Ann., 515; Hampshire Co. v. Franklin Co., 16 Mass., 76; East Hartford v. Bridge Co., 10 How., 511; Trustees v. Tatman, 13 Ill., 29; Coles v. Madison Co., 1 Ill., (Breese) 120; and the very late case of Spaulding v. Town of Andover, N. H. Supr. Ct., unreported, but stated, *ante*. p. 198. Most of these cases relate to such questions as the power of the legislature to control the funds or property of the municipality, so far as to change their use or application from one municipal purpose to another; to apportion such property on the division of the municipality; to subject the corporation to legal liability for claims founded in justice, which liability might be enforced against the corporate property; to take away a franchise (as of a public ferry) previously granted by the state to the municipality; to release a penalty given to the municipality after judgment in its favor therefor, and the like. These powers have generally been sustained by the decisions, though the power of apportionment on division of the municipality has in some cases been denied to exist unless exercised at the *time* of the division, or unless made with the consent of that part of the original municipality to be prejudiced thereby. Bowdoinham v. Richmond; Hampshire Co. v. Franklin Co., *supra*. In the few cases that have arisen where the legislature has attempted to directly *deprive* a municipal corporation of specific funds or property in its actual possession (either by appropriating it to purposes not municipal or otherwise) the power appears to have been denied. State v. Haven, 22 Wis., 660; Milwaukee v. Milwaukee, 12 id., 93; Spaulding v. Town of Andover, *supra*. The People v. Kerr, 27 N. Y., 188, maintaining the legislative power to authorize the construction of a railway along a city street, without the consent of, or compensation to, the city, probably does not conflict with the above cases, the city's title to the soil of the street being held in trust for the *general* public.

The power of the legislature to *deprive* the citizens of a municipality of their corporate property, acquired and held for corporate purposes, cannot, it would seem, be maintained (as is sometimes supposed) by a simple reference to the undoubted power to which the corporation is to take away or modify any of the corporate powers. The legislature often possesses the same power over private corporations, by virtue either of express reservations in their charter, or of a constitutional provision or general law to which the charter is subject. But no one would now contend that this would subject the property of such corporations to legislative confiscation, even in case of the absolute repeal of their charter. The corporate body may be regarded as a trustee holding the legal title in trust for the corporators. And it would seem to make no difference that the corporation is a *public* one, and its property *public* property. It is not "public" in the sense of belonging to the *general* public, i. e., the state at large. It belongs, beneficially, to the citizens of the particular municipality, for their own particular and local "*public*" (in distinction from *private individual*) uses, and they would seem to be as much entitled to protection against deprivation at the mere pleasure of the legislature of their corporate as of their individual property.

It is suggested, with diffidence, that the true test to determine whether property-rights of a municipality are, in a given case, subject to be taken away or defeated by legislative enactment, is to ascertain whether such rights are complete and perfect, needing no further corporate action to protect them; or whether they are as yet *inchoate*, requiring the further exercise of the chartered powers of the municipality in order to bring them to perfection. In the former case, it is submitted, such rights, though acquired by the past exercise of powers conferred by the legislature, and liable to be taken away by it (the taxing power or any other), are to be regarded as *vested* rights, and covered by the shield of the constitution. In the latter case, the right must be regarded as imperfect and not *vested*, and liable to be defeated by the repeal of the power on the exercise of which it depends.

The result of the application of this test to the particular state of facts presented by the principal case, *supra*, viz.: a legislative release of uncollected taxes lawfully levied by and due to a municipality, would depend on the ques-

tion whether the levy of a tax creates the same relation of debtor and creditor between the tax-payer and the municipality as a contract between private parties; establishing a complete obligation on the one part to pay, and a title on the other to receive, which demand no *further* exercise of the taxing power to perfect them. If this be so, then the right is "*vested*," and the legislature cannot destroy it. If the contrary be the case, then the right of the taxes is *inchoate*, and must fall with the withdrawal of the power on which it depends.

J. N. R.

Davenport, Iowa.

[From our own correspondent.]

Recollections of Mr. Choate.

BOSTON, July, 1874.

EDITORS CENTRAL LAW JOURNAL:—No other man, who has been dead fifteen years, is so well known in Boston as Mr. Choate. Probably no man ever more earnestly desired to be remembered—as nothing so much pleases a good mother, who, at the same time is good-looking, as to see her *fac simile* in the face of her daughter. No doubt what Mr. Curtis justly called the sweetness of Mr. Choate's temper and the courtesy of his manner, have contributed much to keep his memory alive, for these were indeed sweet and most courteous, and altogether worthy to be remembered. He never offended anybody—never made anybody sad; nobody ever went from his presence but to tell the next friend he met he had just seen Mr. Choate and what Mr. Choate said. But, after all, it is not his manners alone, nor chiefly, charming as they really were, nor yet the sweetness of his temper, that keeps his memory alive, but exactly this: We saw in him a supreme genius, such an one as we had not until then seen, nor have since, nor expect to see again, and as such he is remembered. Mr. Dana said he was a "*unique creation*;" which would be quite true and apt if men were created, which they are not, but only generated. Mr. Choate was *unique*; that is, he existed, so far as I know, without an equal—without another like him that I know of. We sometimes have quite pretty plants in the public garden at Boston. Mr. Everett's statue overlooks some such now; but they all need the care of the gardener with his water-pot morning and evening, else they droop and die. But the plants that grow wild in luxurious entanglement in the gorges of the Savoy Alps, where warmth and moisture are perpetual and harvest home and vintage never fail—they are seldom or never seen in New England.

When a case was presented to Mr. Choate, he saw more of it than had been seen by others. He often saw it in some new relation; just as in a case which was pending in Maine, some years ago, in which eminent counsel had been engaged, and which had been through all the courts, and up to Washington and back, with an opinion of the supreme court against the defendant, when, for the first time, the papers, with the opinion, were put into the hands of Mr. Paine, and he saw there was a defence which had not been made, but which was perfect. He tried for a week or so to make his junior, who was his senior in years, understand it; but vainly, until, when on their way to the court house, on the morning when the case was to be re-tried, and when Mr. Paine had gone slowly over the case with him, the old man, all of a sudden, saw the point, as "*in a vision*," and fell to beating the wind and his person and exclaiming—*We've got 'em! we've got 'em!* Then suddenly stopping in the road, he added, in a lower tone, and with evident sadness, to Mr. Paine: "*Between you and me, in the determination of this cause I shall lose a source of income which I had hoped would last while I lived.*"

One of Mr. Choate's first questions on consulting him, was—Is there any infirmity in our case? Another was—What are the salient points? He would have you go all over the case with him; then he would take the papers home; and quite likely when you saw him the next morning, you would learn he had marked out a new course. When the bar meeting was held, soon after his death, and some others who had not been too friendly in his lifetime seemed anxious to connect themselves with his fame, some said he excelled most in the argument of questions of law; others said, it was in the trial and argument of causes before a jury; one said he shone most when addressing legislative committees. The truth is, he shone everywhere, and almost with equal brilliancy wherever he was engaged. For my part, I was associated with him at the argument of the case of Cunningham against the city of Boston, before the fall court, which was one of the last cases he ever argued, in the spring of 1859; and I then thought I never heard him argue so beautifully and well.

His taste for the beautiful was exquisite, and he did not need to be told what beauty was. He knew it by sight. If Socrates had seen and heard Mr. Choate, instead of a long and vain attempt to show in what the essential quality called beauty consisted, he would, I think, have contented himself with pointing to Mr. Choate as an example. Mr. Choate thought faster than he could write, which caused him, even with his rapid manner of writing, to make some mistakes—as a swift-running horse finds difficulty when running in keeping his fore legs out of the way of the hind ones, by which he is propelled.

But his lines are straight across the paper, and his letters are all beautifully cut and turned. If wealth consists in beautiful thoughts, Mr. Choate was the richest man I ever knew.

PELHAM.

[Communicated.]

Law Schools—Admissions to the Bar.

EDITORS CENTRAL LAW JOURNAL—GENTLEMEN:—Permit me to offer a few words in reply to the severe and indiscriminate attack on law schools, contained in your articles of July 2d, on "Admissions to the Bar," and of July 9th, "Law Schools—Reform Needed." I call the attack indiscriminate, because all law schools alike are embraced in it, without reference to the great difference existing among them in the very points upon which the attack is based. It is "the beneficial effect of law schools," as a class, "upon the profession or the public," that you call in question. Had your remarks been based, as those you quote from the Albany Law Journal were, upon the circumstances of a single state, the judgment implied would not be so severe. In New York, the legislature have passed a stringent law requiring a long term of study and careful examinations, before a student's admission to the bar; and the profession there seem to be making laudable efforts to carry out these regulations in their true spirit. This being the case, the exemption of the graduates of two or three schools from these rules, is undoubtedly a mistake. It can only be defended as a temporary measure, intended to protect the schools from the injustice that would otherwise have been done them before they could adapt their own course of study to the new system. And if I remember aright, the exemption is a temporary one, which will expire in a year or two—at least, as soon as any valuable fruit can be expected from the new rule of admission. In most of the states, no such legislation has even been proposed; it is doubtful whether popular sentiment would admit of a rule requiring two or three years' study in all cases before admission. To insist under such circumstances that the law schools alone should be required to adopt a course of that length, would be simply to abolish them—a course for which I think even their severest critics are hardly prepared.

Again, it seems to be assumed in the articles referred to, that the diplomas of all law schools are awarded at the mere will of the faculty, and that the professors have no control over the accessions thus made to their number. Whether this is the case in New York, I cannot say; but as all the schools there are private foundations, which originally had no power to admit any one to the bar, it may very probably be so. But it certainly is not the case generally. I doubt if there is a single law school in the West, whose diploma is of itself an admission, that does not give the courts or the bar an opportunity to test in every possible manner the fitness of its graduates for practice, and to exercise their influence on the whole course and manner of instruction. If this opportunity is not used, the blame does not lie with the schools; and if the profession will not take the pains to maintain an easy supervision over admissions from a few schools, how can it be expected that they will, as a body, watch and guard the innumerable courts and committees of examination through which, as through so many open doors, students are constantly pouring into the bar from the offices?

I do not wish to make any invidious comparisons or praise any particular school; but as this question is simply one of fact, you will permit me to use as an illustration the school with which I am most familiar. The graduates of the law department of Iowa State University, are, by law, admitted to practice on the presentation of their diplomas after a course of a single year, and, therefore, come directly within the terms of your criticisms. But who is it that determines who shall receive the diplomas? Every year since the foundation of the school, the Supreme Court of Iowa have appointed a committee of examination from among the best members of its bar, whose decision on the subject is absolute and final. They take the candidates for graduation into their own hands—the faculty, as a rule, not even being present—and examine them in their own method until they are fully convinced of their competency or failure, as the case may be. I have heard many examinations, both in the East and West, and I can truly say that no others, in my experience, have even approached the thoroughness and severity of those usually given by these committees. But that, after all, is not the point; be the examination severe or lenient, it is the Supreme Court of the State, and a picked number of members of the bar that decide finally who shall have the diplomas. If the law schools were all out of the way, how would you guard admission to the bar if not by this very method?

I mention this, not as a credit to the particular school, but for the very reason that I do not believe it to be a singular instance; on the contrary, I think a careful enquiry would show it to be only the type of the whole class, and would prove that no class of candidates for the bar are so carefully tested in all respects, or have their entire competency, intellectual and moral, guaranteed so conclusively by the bar and bench itself, as these decried graduates of law schools "turned out as with machinery."

Let me add one more significant fact—I state it of my own knowledge, but I have no doubt it can be verified from the experience of every law school in the country. Not only do the rejected candidates, who have gone through the whole course, but failed to get a diploma, find easy admission to the bar by the ordinary method as if they had come from an office; but one of the chief difficulties that law school teachers find in maintaining a high standard in their classes, arises from the fatal facility with which any student who has been a term or two in the school, can secure admission to the bar of the district or circuit court without the labor and expense of finishing a *whole* year's course! Every year a considerable number of students leave the school at intervals during the course, going home to get admitted by the old-fashioned process as so much easier than that of the school. Surely this does not look as if the profession needed protection against the law schools.

But I have already claimed too much of your valuable space, which can be used to much better purpose than in discussing an issue that the sound sense of the profession is rapidly settling for itself, as the constant growth of law schools testifies. For the recent outcry against them there may be, as I have already acknowledged, local and temporary grounds. But most of it sounds to me very much like what I used to hear when a student, about the disuse of special pleading. Then, it was the code system that was ruining the character of the profession, and filling it "with mere theorists and speculators, whose blunders and misleadings will cause great confusion and serious losses." The generation, of whose future such dark prophecies were uttered, has now grown into the seniors of the bar, and is expressing in its own way its profound and sincere conviction that all good law will be buried in its coffin.

Do not understand me, however, as maintaining that our present law schools do not need improvement. No one can appreciate their imperfection more than I do. They are, as yet, but mere experiments, by means of which we are generally learning the true methods and processes of legal education and legal thought generally. I only deprecate attacks which seem likely to check their growth and development, and restore the wretched empiricism from which they are gradually elevating us. In another letter, if I have not already exhausted your patience, I will venture to say something upon this side of the topic.

Yours respectfully, &c., &c.,

IOWA CITY, July 16th, 1874.

W. G. H.

COMMENTS.—The foregoing communication is from the learned and accomplished Dr. Hammond, one of the professors in the law department of the University of Iowa. Speaking for the profession, as well as for ourselves, we shall be glad to have the writer's views concerning what law schools should be. We may then have some further remarks to make on the important subject thus brought into notice. Meantime we enter a disclaimer of any hostility to law schools, and beg to say that we are in favor of their maintenance, and when reformed so as to prevent too rapid graduation we wish them success. In our opinion, the best way to learn law is to spend a portion of the student-period in the office of an active practitioner and the rest in a school having such a corps of competent instructors as we know the gentlemen to be who fill the chairs of the law department of the Iowa University. We do know, that it is utterly impossible, under any instruction, however thorough may be the course or able the professors, for a young man without any office experience to become fitted to practice law in a single course of lectures, and we shall keep up this agitation until the law schools of the country shall adopt a two years' course or its equivalent, or until graduation under the one year system of instruction shall cease to be an equivalent to admission to the bar. We can indorse Dr. Hammond's statement of facts as to the thoroughness of the examinations at the Iowa University, but the burden of our criticism is upon the one year system and not upon the mode of instruction or its extent except in the too limited period required for graduation.

Book Notice.

THE LAW OF NEGLIGENCE. By THOMAS G. SHEARMAN and AMASA A. REDFIELD. Third Edition. New York: Baker, Voorhis & Co. 1874. Sold by Soule, Thomas & Wentworth. St. Louis.

The favorable reception of this work verifies a remark we before made—that the profession are not slow to discover the merits of a good treatise, and this is particularly true where, as in the present instance, it treats of a subject with which the practising lawyer has daily to deal. Steam is the great motive agency of modern transportation, whether on land or water, and it supplies the power by which nearly all manufactories are operated. To successfully carry on the commerce, navigation, and manufactories of the present day, corporations which can collect and combine the vast capital required have been created and multiplied to an extent absolutely surprising, employing a vast army of servants of all grades, from the board of directors or president to the laborer in the most subordinate position. Steam, while it is a necessary, is at the same time a dangerous agency. The life and limb of the employee, and the safety of the public must be duly regarded. Out of these elements,

August 6, 1874.]

CENTRAL LAW JOURNAL.

391

in connexion with legislation touching them, as for example "Lord Campbell's Act" (9 & 10 Vict., chap. 93. 1846), and the statutes in the states of this country modeled upon it, has grown much of the litigation with which the courts have been occupied for the last twenty years. And out of these circumstances has also arisen the necessity for a specific work on Negligence. In executing it, however, the authors, for the convenience of the profession, have not confined it to negligence as a tort, but have also included a vein of the law relating to the negligent performance of contracts.

The first part of the work treats of Negligence—its degrees, and of Contributory Negligence. Then follow separate chapters on the Liabilities of Masters for Servants; of Masters to Servants; and of Servants to Third persons; Landlords and Tenants; Municipal Corporations; and Public Officers; The authors then proceed to treat of the obligations of persons in respect to particular things or kinds of employment—as in the Chapters on Animals, Attorneys, Bankers, Bridges, Canals, Carriers, Highways, Municipal Corporations, Railroads, Real Property, Physicians and Surgeons, Sheriffs, Telegraphs, Water Courses, and many other subjects collected in the chapter on Miscellaneous Cases of Negligence. The work concludes with a chapter on the Measure of Damages in Actions for Negligence.

We can speak from a practical acquaintance with the work of its construction and merits. Scarcely a term of court occurs that it is not referred to by counsel or used by the judges. It is framed upon what we consider in this day, and in the present state of the reports, the true plan: that is, the text is appropriated to the statement of general principles and general results, and the notes to such a minute view of the cases as will illustrate the subject by exhibiting the actual condition of the adjudications. The authors have done their work well, and when we find a meritorious production like the present it gives us sincere pleasure to commend it.

A leading feature of the treatise is its practical character, which is evident on an inspection of the notes and from the fact that though the work contains only about 700 pages, nearly 5,000 cases are cited.

Upon examination we find that, in general, the late important cases have been referred to in their appropriate connections, yet we also discover some omissions, as for example on the important question as to the extent of the burden of proof upon the plaintiff to entitle him to a recovery. It is well known that the decisions are conflicting upon the point whether to recover the plaintiff must not only show that the defendant was negligent, but also that he himself was free from contributory negligence. In sections 43, 44 and 412, the authors give a very full view of the state of the decisions, and in section 44 state their own opinion, which we regard as the sound one, yet they omit to cite the recent decision of the Supreme Court of the United States in the case of the [Washington &c.] Railroad Co. v. Gladmon, 15 Wall. 401. This case holds that the burden of establishing such contributory negligence as will defeat a recovery is upon the defendant, unless, indeed, such negligence appears on the plaintiff's own proofs. In view of the rapid increase of the reports, text writers as well as courts will soon be compelled to discriminate more than at present between courts and cases and this will increase the relative weight and importance of the decisions of the Supreme Court of the United States.

We unreservedly commend this work to the profession, who will find the present edition is revised and much improved.

THE AMERICAN MEDICAL WEEKLY. E. S. GAILLARD, M. D., editor and proprietor, Louisville, Kentucky. Vol. I. Terms \$2.00 per year in advance.

Law and Medicine have, to some extent, a common domain with which medical jurisprudence has to deal. Dr. Gaillard is well known to his profession as an instructor in the Louisville Medical College, and as an experienced editor. He fully appreciates the advantages of a weekly publication, and has therefore established the journal whose name appears above and which we welcome to our table.

STORY ON AGENCY. Eighth edition, revised with additions. By N. ST. JOHN GREEN. Boston: Little, Brown & Co. 1874.

We consider it unnecessary to refer at length to the merits or character of the original work. The judgment of the profession is seen in the fact that since 1839 it has passed through seven editions. This is the eighth, but the additions of Judge Redfield and Mr. Hernack, the former editors, are retained and distinguished. The last edition was published in 1869, and the present editor informs the reader that the present edition contains more than 400 additional cases, most of which have been reported since the publication of the last edition.

LAW OF MECHANIC'S LIENS ON REAL AND PERSONAL PROPERTY. By SAMUEL L. PHILLIPS, Washington, D. C. Boston: Little, Brown & Co.; 1874. pp. 728. St. Louis: Sold by Soule, Thomas & Wentworth.

The common law gives to mechanics and material-men no lien upon

the buildings into which the labor of the one and the materials of the other have gone, or upon the land on which the buildings are erected. The equity of these persons to such a lien is so persuasive, and the necessity and expediency of making provision for their better security have been so generally and so strongly felt, that in every American state there are enactments giving and regulating the lien of mechanics and material-men. This branch of the law is, therefore, purely statutory; but it is, nevertheless, one of no considerable practical importance.

The present work, while limited in its subject to one topic, is framed, as the author states in his preface, upon the plan of incorporating into it all that can be found in the reports concerning it. We believe he has done so. The exact force and meaning of a decision arising under a special statute can only be known when the language of the statute is given, and the general scope of the enactment understood. The author often quotes briefly the text of the statute in stating the construction it has received, but whether he has done so sufficiently to prevent error in elsewhere applying his brief statement of local decisions, may admit of some question. We have no doubt of the general usefulness of this work, and it certainly has been prepared with much labor and it seems to us, also, with much care. We have had no opportunity of verifying the author's citations and statements, but we have examined his book sufficiently to have formed the most favorable opinions concerning it, and we do not hesitate to recommend it to our readers.

OLIVER'S PRECEDENTS IN PERSONAL AND REAL ACTIONS, WITH ANNOTATIONS. Revised and enlarged by a member of the Cumberland bar; with references to the later statutes and decisions, and a large number of new precedents, framed by eminent pleaders; embracing also rules, forms and precedents, according to the practice acts of Massachusetts, supervised by a member of the Suffolk bar. Draper, McLellan & Co., Portland, Me. 1874. St. Louis: Soule, Thomas & Wentworth.

This work so well known in New England and by New England lawyers, has an interesting history. It had its origin many years ago in the "American Precedents of Declarations" compiled by B. Perham, Esq., assisted by Joseph Story, then a young man just commencing his professional life. These Precedents received the approval of the profession for years, and were finally added to, and newly arranged by, Benjamin L. Oliver, by whose name the work is now known. This is the fourth edition modernized. It omits nothing of the original work (and in that the present editor has done wisely), and has added 200 pages of new matter, with notes and citations of cases.

The additions record the changes in the state of society, and consequently, of the law which regulates and governs society. In former editions there was no form for actions against towns for defective ways, against railroads and telegraph companies for neglect in collisions and other things; against parties fraudulently concealing from creditors the property of their debtors; against stockholders or corporations for corporate debts; against conductors of railroads; against physicians for mal-practice; any variety of forms in actions against insurance companies; to recover subscription to railroads; to enforce mechanics' liens, etc., etc.

This has been supplied in this edition, and appropriate forms have been given, often with the names of well known lawyers affixed to them. Whoever is in want of a convenient and reliable manual in one volume of Forms of Declarations, or Petitions, or Complaints at Law, will find this to be a useful work. It does not contain forms of plead or answers. We are tempted to add that the loose and unskillful manner of pleading which has accompanied, if not caused the code era, makes a recurrence to these forms by the younger lawyers desirable. To frame a good declaration or a good special plea, good in substance and good in form, requires a philosophic knowledge of the case or defence, and argues a good lawyer, and our experience under the code is that approved precedents are too much overlooked.

Summary of our Exchanges.

The Legal Gazette, for July 31, publishes The Pacific R. R. Co. v. McGuire, published in this journal for April 30. Also Hicks v. Kelsey, Supreme Court of the United States, October Term, 1873, holding that the mere change in an instrument or machine of one material into another, as of wood, or of wood strengthened with iron, into iron alone, is not "invention" in the sense of the patent acts, and therefore is not the subject of a patent; the purpose and means of accomplishment, and form and mode of operation of each instrument, the new as of the old, being each and all the same; and that the mere fact that the new instrument is a better one than the old one, requiring less repair and having greater solidity than the old one, does not alter the case. It does not bring the case out of the category of more or less excellence of construction.

It also publishes Schooner Mary H. Banks v. Steamer Falcon, same court, same term, in which case a steamer collided with a schooner in Chesapeake

bay, causing the sinking of the schooner. It appearing from the facts of the case that the steamer was in fault, the court held the steamer to be liable for the full value of the schooner at the time of her loss. And this notwithstanding the fact that the schooner was afterwards raised and repaired.

It also publishes Ahl's Appeal and Rice's Appeal, Supreme Court of Pennsylvania, July 2, where the court hold that jurisdiction of the court over a fund arising from the sale of the property and franchises of a corporation having attached, equity comprehends within its grasp all incidental matters necessary to enable it to make a full and final distribution, and therefore to terminate litigation, while it affords a perfect remedy; and that in this particular case the master appointed by the court below should have distributed the fund among the several claimants and not only to the parties holding the second mortgage bonds of the company.

The Chicago Legal News, for August 1, publishes Oregon Steam Nav. Co. v. Winsor, published in this journal for July 16. Also Knowles v. Logansport Gaslight Co., Supreme Court of the United States, October Term, 1873, on the conclusiveness of judgments of sister states. This case was noticed in our issue for March 19 (*ante*, p. 135), and was also published in full by us in our number for June 25, in a note to the more important case of Thompson v. Whitman, which it follows and applies (*see ante*, pp. 211, 312.)

The Legal News also publishes a highly interesting and important decision by Mr. Circuit Judge Drummond, United States Circuit Court, Northern District of Illinois, in The Atlantic & Pacific Telegraph Co. v. The Chicago, Rock Island & Pacific R. R. Co., of which the following is the syllabus: "An act of Congress of July 24, 1866, provides that any telegraph company then organized, or which might thereafter be organized, etc., should have the right to construct lines of telegraph through and over any portion of the public domain of the United States, and over and along any of the military or post roads of the United States, which had been or might thereafter be declared such by acts of Congress. Other acts declare all railroads in the United States to be post roads: *Held*, that it was not intended by these statutes to authorize any telegraph company to work on the road way of a railroad, or upon a post road of a railroad belonging to it, and not to the public, and that the plaintiff has no right to establish a telegraph line upon defendant's right of way without making compensation therefor in accordance with law."

The Legal News also publishes a very interesting bankruptcy decision of Mr. District Judge Blodgett, of the United States District Court at Chicago, holding that creditors who, since the amendment of June 22, 1874, have joined in the petition, cannot afterwards be allowed to withdraw from the proceedings; that such a practice would lead to underhanded agreements between the debtor and a part of his creditors at the expense of the others, and cannot be allowed. But the learned judge intimates that if all desire to dismiss the proceedings it could be done.

The Legal News also publishes Main v. Second National Bank of Chicago, decided by Mr. District Judge Hopkins, and published in this journal for April 30 (*ante*, p. 232.) Also Vallette v. Bennett, Supreme Court of Illinois, construction of the deed of an assignee in bankruptcy. Also Freese v. Tripp, Supreme Court of Illinois, expounding the Illinois temperance law of 1872, with reference to the measure of damages which a wife is entitled to recover against a saloon keeper who sells liquor to the husband, whereby she suffers injury in consequence of his becoming intoxicated. Also Carpenter v. Sherfy, same court, sheriff's sale under a void judgment.

The Albany Law Journal, for August 1, contains an article by "D.", combatting the views contained in a previous article by J. Alexander Fulton, Esq., of Dover, Delaware, on the doctrine of ancient lights. Under the head of "Some Recent Decisions" we are made acquainted with the points ruled in a number of interesting cases in 11 American Reports. John F. Barker, Esq., of New York, discusses the interesting question, Who is the Legal Custodian of Dead Bodies? This number of the Albany Law Journal contains (as usual) much other interesting and instructive matter.

The Chicago Railway Review, for August 1, publishes Osborne v. Hartford & New Haven Railroad Co., Supreme Court of Connecticut, on railway taxation. Also a synopsis of Chief Justice Waite's opinion in Swasey v. The North Carolina Railway Co., *et al.*, which was a suit on railway-aid bonds guaranteed by the state of North Carolina.

We do not find in our other exchanges, received this week, anything of general interest.

Notes and Queries.

ST. LOUIS, July 27, 1874.

EDITORS CENTRAL LAW JOURNAL:—Do you know anything of the work just published by Dunlap & Blickensderfer of Erie, Penn., entitled "Law Stu-

dent's Review book?" Is it a reliable work, or is it any account at all? Answer through columns of CENTRAL LAW JOURNAL, and oblige

STUDENT.

ANSWER.—We have not seen the book referred to, but will give "Student" the benefit of the opinion of two of our exchanges. The Legal Intelligencer says of it: "When a student at law has read the course usually assigned him by his preceptor, the latter calmly directs him, as examination approaches, to 'review' what he has read. This practically means a re-reading of the whole, which the time will not allow. At this juncture the student will find the above work of very great value. It is a pocket edition of common and mercantile law, by which he can more readily familiarize himself with their ever-recurring principles, than by the tedious perusal of voluminous text-books. Within its 300 hundred duodecimo pages are embraced abridgments of Blackstone, Evidence, Pleading, including Parties to and Forms of Action, the Law of Contracts, and a Glossary of law terms and phrases. We are surprised and gratified to find so small a book contain so much useful matter, well digested and arranged."

The more critical editor of the Albany Law Journal notices it as follows:

"This little book is designed, as we gather from the preface, to aid the student in a review of some of the principal topics of the law. So far it will be found convenient and useful, but we should not recommend any one to undertake to get from it a knowledge of the law, *de novo*. It contains a synopsis of Blackstone's Commentaries, and of the rules of evidence, pleading and contracts, and concludes with a brief tribute to Blackstone, written, we are informed, by Mr. Dunlap, while engaged in the study of Blackstone's Commentaries. Mr. Dunlap would better have stuck to the Commentaries and let verse-making alone. We quote the concluding lines of this wonderful effusion:

'Where shall we look but to the great Creator,
For one superior to our commentator?'

Legal News and Notes.

—MAJOR ASA BIRD GARDINER, judge advocate, has been assigned to duty as professor of law at the West Point Military Academy.

—COL. THOMAS C. NESBITT, of Georgia, is dead. He was a prominent man of that state, and an able lawyer.

—JAMES M. SHERMAN, Esq., an eminent member of the New York bar, and a widely known and much esteemed citizen, died suddenly at his residence in New York city, on the 27th instant.

—EDWARD LANGE, convicted last October of stealing United States mail bags, and sentenced by Judge BENEDICT of the United States District Court at Brooklyn, to pay a fine of \$200 and be imprisoned one year, was subsequently resentenced to imprisonment alone, the first sentence being contrary to the statute. The second sentence was declared invalid by the supreme court, and Lange was discharged. He now has begun suit against Judge BENEDICT, for false imprisonment, claiming \$50,000 damages and his costs.

—A JUDGE OF ONE OF THE COURTS OF KENTUCKY, the other day, so far forgot what was due to his high office as to challenge the editor of the Cincinnati Enquirer to mortal combat. The challenge elicited a card from the editor in which he uses the following language:

"If I acknowledged the right of every public wrong-doer, whose acts are discussed in the Enquirer, to challenge me to mortal combat, I would find my time so thoroughly taken up with affairs of honor that I would neither be able to earn a livelihood nor serve the public. I have already expressed the opinion the code is the refuge of swashbucklers."

—THE trustees of the Louisville Medical College (Louisville, Ky.), appreciating the impoverished condition of the whole country, have determined to grant a beneficiary scholarship to any young man who, sufficiently educated to study medicine and of good character, is unable to pay for his education. To secure this valuable aid, application, with a full statement of the facts, should be made without delay to Dr. E. S. Gaillard, dean, Louisville, Ky. The Louisville medical college is one of the best in the country. Dr. Gillard, one of the principal instructors, is the editor of two widely circulated medical journals, and has a reputation coextensive with the Union.

—THE business of defrauding life insurance companies is getting to be an important branch of the blackleg profession. We have recently seen Udderzook and Goss burn up a resurrected corpse in a tenement in Baltimore, for this purpose; and then we have seen Udderzook kill Goss in order to cover up the crime. Still later, a doctor somebody is sent to the penitentiary for two years by a court in New York city for burying a coffin full of bricks, with a like thrifty end in view. And now comes a report from Ireland to the effect that some smart fellows have been detected in a conspiracy to cheat the New York Insurance Company, but unfortunately for themselves they were found out. Among the accused were two doctors, who certified as

to the health of their neighbors from general knowledge, without taking the trouble of asking the interested persons whether they wanted their lives insured or not. The jury considered that this was criminal neglect, and found them guilty, as well as the agent, who seems to have been the organizer of the conspiracy to defraud. All three were sent to prison, with hard labor, the doctors for twelve months and the agent for eighteen. In the opinion of the Irish press the punishment is too light.

—HON. JAMES B. BOWLIN, formerly judge of the Criminal Court of Saint Louis, and who since filled many important public stations, died recently in Saint Louis. Hon. Lewis V. Bogy, speaking in eulogy of Judge Bowlin at the bar meeting called on the occasion of his death, used the following language expressive of the great changes which time has wrought in the ranks of the St. Louis bar: "Among the members of the bar of that day who are still living, I now at this moment remember but John F. Darby, Judge Hamilton, Judge Primm, Gov. Polk, and Judge Drake, now a resident of Washington city. All the other lawyers who were here in 1835 are now dead. Some of them were truly distinguished men, yet, it is painful to say, are now in manner forgotten, even by their successors at the same bar, where at one time they were such leading and shining characters. Yet several of them filled the highest offices in the land—United States senator, judge of the supreme court, governor of the state, member of the lower house of Congress, and cabinet minister of the United States—Geyer, Bates, Spaulding, Gamble, Allen and Lawless were men of decided ability and learning in their profession."

—THE fable of the dog who, while crossing a brook with a piece of meat in his mouth, saw his reflection in the water beneath the narrow foot-bridge, and who dropped the substance in order to snatch at the shadow, has been recently illustrated before our courts. Mr. Blank some years ago married a lady much older than himself, who possessed a snug little property which included real estate in Kansas valued at fifty thousand dollars. Mr. Blank's wife died recently, bequeathing to her husband a life interest in the Kansas property, but her relatives contested the will on the ground that the testator had been subjected to undue influence, and they succeeded in getting the will set aside. Exceptions to this decision were promptly filed, but while Mr. Blank's counsel were waiting to argue them, one of the lawyers thought it would be well to ascertain the nature of the laws of Kansas in relation to the reversion of property by married women dying childless and intestate. He found the Kansas laws differing greatly from our own in this respect, for in that state the property of wives without issue who leave no wills, goes to their husbands. The real estate owned by the deceased wife of Mr. Blank being situated in Kansas, the laws of that state would govern its disposition; therefore the decree of the court, in setting aside Mr. Blank's will, gave her property absolutely to her consort. It is needless to add that the counsel for Mr. Blank dropped their exceptions, and that the joy of their client and the chagrin of his late wife's relatives are about equal, in degree.—*Boston Daily Advertiser.*

Notes of Cases.

Our notes of English cases are from the *Law Times*. Our notes of cases decided in the New York Court of Appeals and in the New York Commission of Appeals are from the Albany Law Journal. Those decided in the Supreme Court of Ohio are from advance sheets of the 24 Ohio State Reports, furnished by Messrs. Roler Clarke & Co., of Cincinnati, or from the American Law Record (Cincinnati). Those decided in the Kentucky Court of Appeals are from the American Law Record. Those decided in the Supreme Court of the United States are from printed opinions in our possession. Those decided by the Supreme Court of Michigan are from Chaney's Quarterly Digest. Others are from cases reported in our exchanges, unless otherwise stated.

Bankruptcy—Composition with Creditors.—It is well known that the feature introduced into our bankruptcy law by the recent amendment which relates to compositions with creditors, is similar to the English and also to the Irish bankruptcy acts. It will, therefore, be interesting to note, from time to time, the decisions of the courts of those countries with reference to this subject. In the case of J. L., an arranging debtor, determined in the Irish Court of Bankruptcy, before MILLER, J., and reported in 8 Irish Law Times Reports, 106, it was ruled that if a debtor who has carried an arrangement under the arrangement clauses of the Irish bankruptcy and insolvency act, 1857, fail to pay the instalments of the composition which his creditors have agreed to accept, the creditors are remitted to their original rights. The court of bankruptcy will not restrain such a creditor from proceeding in a court of common law to recover the entire amount of the debt for which he had agreed to take a composition in the arrangement matter. The learned judge said that "payment of the several instalments of composition in the manner as thus provided is the condition precedent upon which the entire composition hinges, and the debtor was not to be discharged from his original liability to pay the full amount of his debt, unless he paid the

composition according to the manner provided in that composition arrangement; or, in other words, from the moment at which the debtor failed to pay the composition according to his arrangement, any creditor who had not compromised himself by his personal conduct, is necessarily, at his own desire, remitted, according to every principle of equity and law, to his original rights and remedies; and under any such agreement, in the terms as stated, no court of equity would interfere unless the default occurred through some accidental circumstances over which the debtor himself had not, perhaps, any control. In a case like the present, where the arrangement for composition admits of so simple a construction, there is no necessity for reviewing the authorities, which are both clear and cumulative."

Married Women—Partnership.—In *Swasey v. Antram*, Supreme Court of Ohio, December Term, 1873 (Am. Law Record, June, 1874), the following points are ruled:

A married woman has not the capacity to enter into a general mercantile partnership not connected with or relating to her separate property; and where she assumes to do so with the consent of her husband, and is by him assisted in managing and carrying on the business, the husband, and not the wife, is to be regarded in law as the partner.

A *feme covert*, having obtained a "permit" to trade within the lines of the army, with the knowledge and consent of her husband, entered into a partnership with other persons for the purpose of buying and selling goods and merchandise under "permit," and she, with the assistance of her husband, managed and conducted the business. The firm was subsequently dissolved, and its property transferred by the other partners to her, she agreeing to pay all the partnership debts. She then sold the property to S., who had notice of all the facts, and who in like manner agreed to pay the partnership debts. This was all done with the knowledge and concurrence of the husband, who joined her in executing the bill of sale to S. In an action by a creditor of the firm against the husband and the other members of the firm, not including the wife—

Held, that the goods in the hands of S., or the price agreed by him to be paid therefor, and not yet paid, are liable to attachment in the action.

Mexican Grant—Statute of Limitations.—In *LeRoy v. Carroll*, 7 Pacific Law Reporter, 201, Mr. Circuit Judge SAWYER, of the United States Circuit Court for the Ninth Federal Circuit, District of California, decided that the statute of limitations of California does not begin to run against a confirmed Mexican grant, formerly located under the act of Congress of 1860 (12 Stat. 34), until the patent issues. This ruling is based on *Henshaw v. Bissell*, Supreme Court of the United States, October Term, 1873, in which Mr. Justice FIELD, in delivering the opinion of the court, said that "the statute can only begin to run against the title perfected under legislation of Congress, from the date of its consummation."

Municipal Bonds—Enforcement of Payment after Judgment—Aldermen Resigning—Costs.—In *United States ex rel. I. W. Pollard v. The City Council of The City of Pleasant Hill*, United States Circuit Court, Western District of Missouri, April Term, July 6, 1874, an alternative writ of mandamus was, on the 19th day of May, 1874, granted upon an information showing that the relator had previously obtained a judgment against the city, upon which execution has been issued, and returned in part unsatisfied for want of property whereon to levy. The writ commanded the city council to levy a special tax to pay the balance due on the execution. Returns were made by the mayor and councilmen, who together constitute the city council, setting forth that, since the writ was served upon them, all the councilmen had resigned, leaving their offices vacant, and the mayor alone was left to administer the city government; and that the charter of the city conferred no power on him to levy the tax. There was a prayer that the writ abate as to the councilmen, and that they recover costs.

J. W. Rigdon, for respondents. *T. K. Skinner*, for relator, insisted that the costs should be adjudged against the councilmen.

KREKEL, J.—I have no hesitation in adjudging the costs against the councilmen, who have resigned since the writ was served on them, more especially as they make no attempt to purge themselves of their neglect to obey the writ. Having assumed the duties of public offices, they cannot be permitted thus to thwart the process of this court, deprive the relator of his remedy, and at the same time throw the costs upon him.

Marine Insurance—Stamp Act—"Slip"—"An Enormous Subtlety."—An interesting case, though perhaps of no practical importance in this country, was recently determined in the Court of Exchequer Chamber, Westminster, before Lord COLERIDGE, Baron BHAMWELL, Mr. Justice BRETT, Baron CLEASBY, Mr. Justice DENHAM, Baron POLLACK, and Baron AMPHLETT. The point was, whether the usual "slip" given by underwriters preliminary to a policy, and which had always been considered binding in honor, was in any way

binding in law. The company's agent initialed, according to the usual practice, a "slip" for a policy of insurance on goods about to be shipped, and, according to the course of business observed by the company, their agent had a copy of the "slip" from the plaintiff, and sent it to the company, but the goods were lost before the policy was executed, and the company then declined to execute it. The "slip" was dated, March 16, 1871. On the 29th of January, 1872, the company being under liquidation, the liquidators wrote to enquire about the "slip" and had no answer from the agent, though the plaintiff told him to carry it out. On the 3d of February the plaintiff was debited by the broker with the premium and stamp duty, and on the 13th of March the amount was received by the company, and the plaintiff asked for the policy but the defendant declined to execute it, and the "slip" was then lost. The stamp act of 1867 declares that no contract for sea insurance shall be valid, unless it shall be expressed in a policy, and no policy shall be admitted in any court, or be good or available in law or in equity unless stamped. It was impossible, then, to sue the company on any contract of insurance as none was executed, but the plaintiff brought suit on the supposed undertaking or representation that their agent was authorized to accept risks in their behalf.

The judges were agreed that the only contract which could be shown was contained in the "slip," and as that was void under the stamp act, the plaintiff could not recover. The company was censured in severe terms for attempting to evade a contract binding in honor, but the judges could see no grounds on which to sustain it; and Baron BRAMWELL said that the reasoning of the dissenting justice of the Queen's Bench, Mr. Justice BLACKBURN, who held that the plaintiff entitled to recover, involved "an enormous subtlety."

Criminal Law—Receiving Stolen Goods—Evidence—Practice.—Plaintiff in error was indicted for receiving stolen goods. Upon the trial the prosecution, for the purpose of proving the *scienter*, showed that the accused had received property from other persons, knowing the same to have been stolen. Held, error.

If a prisoner upon trial for one offence calls out upon cross-examination without objection, facts tending to show that he is not guilty of another offence, this does not justify evidence on the part of the prosecution to prove that he is guilty of such other offence.

Calling out evidence for one purpose apparently innocent, and using it for another purpose which is illegal and improper, if it is manifest that the avowed object is colorable merely, is error. *Coleman v. The People*, N. Y. Court of Appeals. Opinion by ALLEN, J.

Gift.—This was an action brought to recover the balance of a book account alleged to be due from defendant. Plaintiff, with an intent to give the account to defendant, received a dollar from him which was credited, and then the account balanced by this entry: "Gift to balance account." Plaintiff also gave to defendant a receipt, stating in substance that he had received one dollar in full to balance all accounts. Held, that this constituted a valid gift, and plaintiff could not recover. *Ryan v. Wood*, 48 N. Y. 204, and *Bunge v. Koop*, Ib. 225, distinguished. *Gray v. Barton*, same court. Opinion by GROVER, J.

Partnership—Action against Estate of Deceased Partner—Pleading.—Action against defendant as executrix, etc., of C. to recover an indebtedness of the firm of D & C., of which firm defendant's testator was at the time of his death a partner. Plaintiff had recovered a judgment therefor against D., the surviving partner, execution was issued thereon and returned unsatisfied. Upon the opening of plaintiff's case, defendant's counsel moved for a dismissal of the complaint upon the ground that it did not state facts sufficient to constitute a cause of action, inasmuch as it did not allege that the surviving partner was insolvent. The motion was denied, and defendant's counsel excepted. There was evidence given tending to show that D., the surviving partner, had property liable to levy and sale on execution sufficient to satisfy the judgment. The court below ruled that even if this was proved, in the absence of any proof of collusion, the return of the sheriff was sufficient to sustain the action, and defendant's counsel excepted. Held, no error; that a partnership creditor may enforce payment against the estate of the deceased partner, without bringing an action against the survivor, when he can prove the insolvency of the latter, or he may exhaust his legal remedy against the survivor, and then proceed against the deceased partner's estate. *Pope et al. v. Cole*, executrix, etc., same court. Opinion by GROVER, J.

Railway Aid Bonds—Construction of Statute.—Under the provisions of the act of 1869, authorizing municipal corporations to aid in the construction of railroads (chap. 907, Laws of 1869), as amended in 1871 (chap. 925, Laws of 1871), in order to give the county judge jurisdiction, the petition must show that the petitioners are a majority of the tax-payers of the municipal corporation to which it relates, "not including those taxed for

dogs or highway tax only." *People ex rel. Green v. Smith*, County Judge of Ontario Co., et al., same court. Opinion by ANDREWS, J.

Indictment—Larceny.—Brown and Libby were convicted of larceny. The error assigned is insufficient description of the stolen property, e. g., "fifty dollars in money of the value of fifty dollars." Held, that the indictment was good. *Brown v. People*, and *Libby v. People*, Supreme Court of Michigan, April Term, 1874.

—. —. This general form of charging larceny of money in an indictment would not have been good at common law without alleging the grand jury's inability to describe the money more specifically (*Mervin v. People*, 26 Mich. 298), and then only on proof of larceny of coin or legal tender of the country. *Ibid.*

Statutory and Common-Law Indictments.—The constitutional requirement that in every criminal prosecution the accused shall be informed of the nature of the accusation (Const. Mich., art. VI, sec. 28), was not meant to prevent the legislature from so altering the common-law form of charging an offence as to dispense with mere formal description, and unsubstantial particularity. But they can authorize no form of indictment that shall not give the offender fair notice of the particular offence to be proved, and an opportunity to procure his testimony in defence, that he may not be taken by surprise on the trial. *Ibid.*

Proof of Larceny.—In prosecuting for larceny of money, proof of the larceny of any single piece or bill of any denomination alleged, and of any value whatever, will sustain the indictment. *Ibid.*

"Money" Subject to Larceny.—The statute (Comp. Laws, § 7930), making it a sufficient indictment to allege generally a larceny or robbery of money, applies to United States legal tender notes. It might, perhaps, be invalid as to promissory notes and bills of exchange generally, and as to the notes of private parties, but valid as to coin and those descriptions of paper usually recognized as money. *Ibid.*

Specific Performance.—The power vested in courts of equity to compel the specific performance of contracts does not imperatively attach wherever there is a contract relation which the complainant has respected and the defendant has not. The specific peculiarities of the case, the doctrines of equity jurisprudence, and the settled principles and maxims of the court, must in each case be considered. (*McMurtrie v. Bennette*, Har. Ch. 124; *Smith v. Lawrence*, 15 Mich. 499; *Chambers v. Livermore*, 15 Mich. 381; *Willard v. Tayloe*, 8 Wall. 557). The real equity of the proceeding means performance on both sides, and not a compulsory surrender by one party to another without a present substantial and practical equivalent susceptible of enforcement by the courts. *Buck v. Smith*, Supreme Court of Michigan, April Term, 1874.

—. **Indefinite Partnership.**—A court of equity will not undertake to compel a party to go into a partnership where the agreement therefor is silent as to its duration, and where it may therefore be dissolved at the will of either as soon as formed. *Ibid.*

—. **Enforcement of Indefinite Duties.**—A court of equity cannot enforce the performance of daily prospective duties, or supervise or direct in advance the conduct of one who is to manage in the interest of a firm in which he is to be a member, and where the agreement contemplates that his personal skill and judgment shall govern according to the shifting needs of property and business. The doctrine of specific performance will not sanction such one-sided relief as to grant one party the essence of his claim, and decree the other a mere right to exact the consideration through the future performance of duties incapable of being specifically decreed. (*Blackett v. Bates*, L. R., 1 Ch. Ap. 117; *Stockier v. Brockelbank*, 5 E. L. & Eq. 67; *Johnson v. Shrewsbury & B. Ry Co.*, 19 E. L. & Eq. 584; *Pickering v. Bishop of Ely*, 2 V. & Coll. C. C. 249; *Kemble v. Kean*, 6 Sim. 333; *Kimberley v. Jennings*, 6 Sim. 340; *Baldwin v. Society, etc.*, 9 Sim. 393; *Gervais v. Edwards*, 2 Dr. & W. 80; *Bozon v. Farlow*, 1 Mer. 459; *Flight v. Bolland*, 4 Russ. 298.) *Ibid.*

—. **Case in Judgment.**—Smith was to purchase an interest in a certain lumbering firm for the joint benefit of himself and Buck, he to furnish the money, and Buck, who was to be a partner, the skill and experience. There was between the two a written agreement, with which the other members of the prospective firm had nothing to do, providing for a quit-claim from Smith to Buck, and under this the latter began payment. Smith, however, went into the partnership and Buck was excluded. Buck asks specific performance, an accounting, and such relief by injunction as will protect his interest. His bill was dismissed, and this decree was affirmed, but without prejudice. *Ibid.*